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CBS CORPORATION
51 WEST 52 STREET
NEW YORK, NEW YORK 10019-6188
NOV 14 3 13 PM '00
(212) 975-4595
FAX (212) 975-7292
hfjaeckel@cbs.com

HOWARD F. JAECKEL
VICE PRESIDENT, ASSOCIATE GENERAL COUNSEL

BY FAX AND AIRBORNE EXPRESS

Re: MUR 5102

Dear Mr. Jordan: November 13, 2000

This is in response to your letters of October 2 and 11, 2000,[1] inviting the response of CBS Broadcasting Inc. ("CBS") to a complaint filed with the Federal Election Commission ("FEC" or the "Commission") by Jeff Graham, the Independence Party candidate for U.S. Senator from New York in the recent general election. The complaint alleges that the broadcast and sponsorship by WCBS-TV New York[2] of a debate between Hillary Clinton and Rick Lazio, in which Mr. Graham was not invited to participate, constitutes a corporate campaign contribution or expenditure by CBS in violation of the Federal Election Campaign Act ("FECA" or the "Act"). In so contending, Mr. Graham relies on Section 110.13 of the Commission's rules, which requires that news organizations which sponsor candidate debates select the participants in accordance with "pre-established objective criteria."[3]

Within the next several weeks, CBS will file a petition for rulemaking with the Commission urging that it amend its regulations to make clear that the sponsorship by a news organization[4] of a debate between two or more political candidates does not, under any circumstances, constitute an illegal corporate campaign contribution. In that petition, we will contend that it is contrary to precedent, and manifestly illogical, to consider such debates -- which are often characterized by the participants' stinging

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1 The Commission staff granted CBS an extension until November 10, 2000 to respond to the complaint. Since November 10 was a federal holiday, CBS is filing this response on Monday, November 13.

2 CBS, a wholly-owned subsidiary of Viacom Inc., owns and operates WCBS-TV.

3 11 CFR §110.13.

4 Section 100.7 of the Commission's rules excludes from the definition of "contribution" and "expenditure" any "cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication ... ." For purposes of this response, we define "news organization" in the same manner.

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attacks on one another -- to be campaign "contributions." We will also show that the Commission's efforts to assert jurisdiction in this area are contrary to the clear intent of Congress, and conflict as well with long-established policies of the Federal Communications Commission concerning the coverage of candidate debates by broadcasters.

For the immediate purpose of responding to the complaint, however, our focus will be more limited. Contrary to Mr. Graham's allegations, WCBS-TV did have "criteria" which it applied in choosing to broadcast a debate including only Mrs. Clinton and Mr. Lazio.[5] The station's criteria were the same as those which typically go into journalistic determinations as to the extent of news coverage merited by a particular candidacy. The key questions in this regard are the amount of public support which a candidate has attracted, and whether the candidate is likely to have a significant impact on the outcome of the election. In making these judgments, journalists typically consider, among other factors, the candidate's standing in the polls, the coverage he has received from other news outlets, the extent of his campaign activities, and other indications of public support, such as attendance at campaign rallies. See Affidavit of Joel Cheatwood, attached hereto as Exhibit B ("Cheatwood Aff."). As we demonstrate below, when these factors are applied to the facts of this case, it becomes obvious that there was no basis for inviting Mr. Graham to participate in the WCBS-TV debate. Indeed, it is difficult to imagine what "objective" criteria might reasonably have been used which would have resulted in Mr. Graham's *inclusion* in the debate.

It is true, of course, that the considerations discussed above do not constitute a litmus test which can be applied without the exercise of journalistic judgment. Nonetheless, in the absence of evidence that these factors were not applied in good faith, we believe that they constitute "objective criteria" within the meaning of Section 110.13. Indeed, we respectfully submit that interpreting these criteria as being sufficient under the rule is the only means by which a determination as to the rule's constitutionality may presently be avoided.

Thus, ever since the Supreme Court's landmark decision in *Buckley v. Valeo*,[6] it has been clear that the prevention of corruption or the appearance of corruption in the political process is "the only legitimate and compelling government interest[ ] thus far identified for restricting [First Amendment rights in the regulation of] campaign

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5 Complainant has submitted an affidavit supposedly quoting an employee in the WCBS-TV press department as stating that the station "had no criteria at all" regarding whom to invite to participate in the debate, and that "the station simply invited Mrs. Clinton and Mr. Lazio without giving consideration to any other candidates." As set forth in the affidavit of Juliana Silva, attached as Exhibit A hereto, these quotations are inaccurate.

6 424 U.S. 1 (1976).

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finances."[7] In this regard, it is obvious that a corporate news organization's sponsorship of a debate between two or more candidates vying for public office cannot reasonably be regarded as potentially involving "corruption." In other words, the regulation in question is not narrowly tailored to advance a compelling state interest; therefore, if a constitutional determination is required, it must fall.

For this reason, the Commission should find that CBS complied with the regulation by applying well-established journalistic criteria in deciding to present the Clinton-Lazio debate . Any different result would unacceptably impinge on the editorial discretion of journalists, and thereby violate the First Amendment's guarantee of press freedom.

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1. **There is no basis for questioning WCBS-TV's good-faith exercise of its news judgment.**

We have outlined above the factors considered by the news professionals at WCBS-TV in making judgments as to which candidates to invite to participate in a debate. As indicated, these factors include the candidate's standing in the polls, the coverage the candidate has received from other news outlets, the extent of his campaign activities, and other indications of public support, such as attendance at campaign rallies. When these indicia of a serious candidacy are considered in relation to this case, they compel the conclusion that Mr. Graham was without significant public support, and that his effect on the outcome of the election was at all times almost certain to be nil.

As set forth in the attached affidavit by Joel Cheatwood, WCBS-TV's news director, at no time during the senatorial campaign did Mr. Graham register meaningful support in the polls. For instance, a poll conducted by Zogby International on October 2, 2000 -- only six days before the debate in question -- showed Mr. Graham as attracting no measurable support.

Similarly, Mr. Cheatwood indicates that he is unaware of any newspaper or television station in the state which carried coverage of Mr. Graham's campaign more extensive than a brief mention of the fact that he was running. Indeed, a *Nexis* search covering all of the year 2000 reveals only a relative handful of passing references to Mr. Graham's candidacy.

In addition, Joel Cheatwood indicates that Mr. Graham's campaign was virtually invisible, even when measured by his own activities and those of his supporters. In this regard, Mr. Cheatwood states that, other than a small joint demonstration with the Green Party at WCBS-TV on the day of the Clinton-Lazio debate, he was aware of no campaign activities by or on behalf of Mr. Graham.

The actual results of the election bear out these observations. As reported by *The New York Times,* Mr. Graham received only one percent of the vote in the senatorial race.

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7 *FEC v. National Conservative Political Action Committee,* 470 U.S. 480, 496-97 (1985).

Given these circumstances, Mr. Cheatwood indicates his belief that it would have disserved the public interest to include Mr. Graham in a debate between Mrs. Clinton and Mr. Lazio, who ultimately commanded 98 percent of the vote between them. Doing so, he says, would have taken away from the already limited time available for the two major candidates to argue their positions to the voters. Moreover, the distracting effect of a third candidate's participation in the debate would have been significantly aggravated by also including Green Party candidate Mark Dunau -- who, like Mr. Graham, ultimately received one percent of the vote -- not to mention the candidates of the Right to Life, Libertarian, Constitution and Socialist Workers parties, whose vote totals ranged between 4,100 and 21,000.

This, of course, does not mean that one or more additional candidates should never be included in a debate with the two leading contenders for an office. Broadening the field of participants may often be appropriate as a matter of news judgment. CBS strongly believes, however, that this Commission should not, and constitutionally may not, require a news organization to formalize criteria for the exercise of such news judgments -- or to apply the factors they consider in a mechanistic fashion -- as the price of being allowed to sponsor and present a candidate debate. As the following discussion shows, any effort by the Commission to confine the exercise of such editorial decisions within a regulatory straitjacket would surely violate the First Amendment.

2. Because the regulations in question trench on First Amendment rights, they must be interpreted so as to minimize, to the greatest extent possible, their impact on protected freedoms of speech and of the press.

In its seminal decision in *Buckley v. Valeo*,[8] the Supreme Court made clear that, in order to be constitutional, campaign finance regulations must not unduly infringe on the freedoms of expression protected by the First Amendment. Observing that the "[d]iscussion of public issues and debate on the qualification of candidates [is] integral to ... the system of government established by our Constitution," the Court noted that the "contribution and expenditure limitations [of the Federal Election Campaign Act] operate in an area of the most fundamental First Amendment activities."[9] Accordingly, the Court held those restrictions to be "subject to the closest scrutiny."[10]

8 424 U.S. 1 (1976).

9 Id. at 14.

10 Id. at 25.

In order to survive "the exacting scrutiny required by the First Amendment,"[11] a regulation must both advance a "sufficiently important government interest" and do so by means "closely drawn" to accomplish that end.[12] The Court has stated that, when this test is applied, the necessary fit between ends and means requires that "government ... curtail speech only to the degree necessary to meet the particular problem at hand, and ... avoid infringing on speech that does not pose the danger that has prompted regulation." [13]

Applying this test to the contribution and expenditure limitations of the Federal Election Campaign Act, the *Buckley* Court held that the principal legislative purpose asserted in their defense -- namely the prevention of corruption and the appearance of corruption -- constituted a constitutionally sufficient justification for regulation. Further, the Court found that the contribution limitations were closely drawn to serve that end, noting that limiting the amount that any person or group could contribute to a candidate or political committee "entails only a marginal restriction" on the contributor's expressive rights.[14] According to the Court, while a contribution "serves as a general expression of support for the candidate and his views, [it] does not communicate the underlying basis for the support."[15] Therefore, a limitation on the amount of money a person is permitted to give to a candidate or campaign organization "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[16]

By contrast, the Court found the Act's restrictions on expenditures to "represent substantial rather than merely theoretical restraints on ... political speech."[17] Having construed the statute as applying only to expenditures or communications "express[ly] ... advocat[ing] the election or defeat of a clearly identified candidate,"[18] the Court held that those limitations were insufficiently related to preventing corruption. Even if it

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11 Id. at 16.

12 Id. at 25.

13 *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986).

14 424 U.S. at 20.

15 Id. at 20-21.

16 Id. at 21.

17 Id. at 19.

18 Id. at 44.

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were assumed, the Court noted, that large independent expenditures pose the same dangers of actual or apparent corruption as large contributions,

> [the statute] does not provide an answer that sufficiently relates to the elimination of those dangers. . . . So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. ... [This] undermines the limitation's effectiveness ... by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder.[19]

In fact, however, the Court did not accept the view that independent expenditures lend themselves to corruption. As a consequence, it found that spending ceilings were not narrowly drawn to promote an important government interest. Even independent expenditures directly advocating the election of a particular candidate, the Court said, "may well provide little assistance to the candidate's campaign."[20] Moreover, the Court noted,

> [t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments.[21]

Concluding that the expenditure limitations "heavily burden core First Amendment expression" while "fail[ing] to serve any substantial government interest in stemming the reality or appearance of corruption in the electoral process," the Court invalidated those provisions of the Act.[22]

The Supreme Court has subsequently emphasized that, in upholding the Federal Election Campaign Act's contribution limitations in *Buckley*, it "identified a single narrow exception to the rule that limit[ing] ... political activity [is] contrary to the First Amendment."[23] Likewise, the Court has emphasized that preventing the actuality or appearance of corruption remains "the only legitimate and compelling government

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19 Id. at 45.

20 Id. at 47.

21 Id.

22 Id. at 47-48.

23 *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981).

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interest[ ] ... for restricting [First Amendment rights in the regulation of] campaign finances."[24]

These decisions make clear that the Commission's regulation purporting to restrict the news judgments of journalists in deciding which candidates should be included in a debate cannot withstand constitutional review. Plainly, the staging of a debate between two competing aspirants for public office cannot be considered a contribution to their campaigns in any meaningful sense of the word, since the participants cannot control what happens at the debate and whether it will be helpful or harmful to their candidacies.[25] And although the costs of staging a candidate debate may, in some sense, be said to be an expenditure by a corporate news organization "in connection with" a federal election,[26] that activity is also unquestionably a press function protected by the First Amendment. Since the notion that a news organization's sponsorship of a debate between two opposing candidates might result in its later receiving some sort of *quid pro quo* is far-fetched in the extreme, regulating the news judgments of journalists in this regard manifestly does not serve to prevent the appearance or reality of corruption -- "the only legitimate and compelling government interest[ ]" which could conceivably sustain such an encroachment on freedom of the press.

The potential infringement on First Amendment rights could hardly be more serious. Thus it is undisputed that the press plays an essential role in informing the public about election campaigns. As the Supreme Court has stated

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. ... Without the

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24 *FEC v. National Conservative Political Action Committee, supra,* 470 U.S. at 496-97.

25 The element of control is central to whether the expenditure of money for political expression is deemed a "contribution" under the Act. Thus, for example, if a political advertisement paid for by a third party is controlled by or coordinated with a candidate, it is considered a contribution to that candidate. *See, Buckley v Valeo, supra,* 424 U.S. at 46-47.

26 Although the Supreme Court has held that the First Amendment does not permit the restriction of independent expenditures expressly advocating the election or defeat of a federal candidate by an individual or a political party, *see Buckley v. Valeo, supra, Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996), it has sustained regulations prohibiting such expenditures by a corporation. *See, Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

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> information provided by the press most of us and many of our representatives would be unable to vote intelligently ... .27

Debates and candidate interviews serve as one of the means traditionally relied on by the news media to convey information about political candidates to the public. Any Commission action hindering news organizations in the unfettered exercise of their journalistic judgment in this area would thus clearly violate the First Amendment. [28]

In short, Section 110.13 of the Commission's rules, to the extent applied to press sponsorship of candidate debates, is unconstitutional. Whatever action the Commission takes with respect to the petition for rulemaking which CBS will shortly file, we respectfully urge that it find the criteria applied by WCBS-TV in determining the participants in the subject debate to be sufficient under the regulation. [29]

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27 *Cox Brodcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975).

28 Such a regulation could no more be justified as a safeguard against possible unfairness by the press than by cloaking it in the language of campaign finance reform. As the Supreme Court has stated:

> The choice of material to go into a newspaper, and the decisions made as to ... treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publishing Co v. Tornillo, 418 U.S. 241, 258 (1975); *see also Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 124-25 (1973).

29 It is worth noting in this context that were the Commission not to so construe the regulation, the following anomalous -- and constitutionally unsustainable -- regulatory patchwork would result: "independent" and unlimited expenditures by political parties expressly advocating the election or defeat of identified federal candidates would be permissible, *Colorado Republican Federal Campaign Committee v. Federal Election Commission, supra*; expenditures of "soft money" by political parties, corporations and labor unions for "issue ads" attacking or supporting identified candidates for federal office would be completely unregulated, so long as the ads did not, in so many words, advocate the candidate's election or defeat (*see Buckley v. Valeo, supra,* 424 U.S. at 44; *Faucher v. Federal Election Commission,* 807 F.2d 468 (1st Cir. 1991), *cert. denied,* 502 U.S. 820 (1991); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980); *Maine Right to Life Committee v. Federal Election Committee,* 914 F. Supp. 8 (D. Me.), *aff'd,* 98 F.3d 1 (1st Cir. 1996), *cert. denied* 118 S.Ct. 52 (1997); *Federal Election Commission v. Christian Action*

Sincerely,

Jeff S. Jordan
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
Washington, DC 20463

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Network, 894 F. Supp. 946 (W.D. VA. 1995));and the sponsorship by a news organization of a debate between the major party candidates for a federal office would constitute a criminal violation of the Federal Election Campaign Act, unless the news organization had formally adopted and mechanistically applied so-called "objective criteria" in determining whether any other candidates should be invited.

EXHIBIT A

AFFIDAVIT

COUNTY OF NEW YORK) ss
STATE OF NEW YORK)

21-04-4057

JULIANA SILVA, being duly sworn, deposes and says:

1. I am employed in the press department of WCBS-TV, a New York City television station owned and operated by CBS Broadcasting Inc. I submit this affidavit to correct the inaccurate attribution of certain statements to me in an affidavit submitted to the Federal Elections Commission by Sarah Lyons in connection with a complaint against CBS by Jeff Graham, who I understand was the Independence Party candidate for U.S. Senator from New York in the recent general election.

2. In her affidavit, Ms. Lyons states that she spoke to me before WCBS-TV's broadcast on October 8, 2000 of a debate between Hillary Clinton and Rick Lazio, and that I told her that the station had "no pre-existing objective criteria regarding whom to invite [to participate in the debate] and, indeed, no criteria at all." Ms. Lyons then goes on to quote me as saying that "the station simply invited Ms. Clinton and Mr. Lazio without giving consideration to any other candidates." These quotations of my statements to Ms. Lyons are inaccurate.

3. What actually happened is this. Some time before the October 8 debate, I returned a call which Ms. Lyons had made to Terry Myers, the Executive Producer of the debate. Ms. Lyons told me she was calling on behalf of Jeff Graham, a candidate for Senate, and asked me what criteria the station used to select the debate participants. I told Ms. Lyons that I did not know, and said I would call her back.

4. It was clear to me that Ms. Lyons had called the station because Mr. Graham had not been asked to participate in the debate. In fact, I subsequently learned that the Independence Party was planning a demonstration at the station on the day of the debate, and that it contended that the station's failure to invite Mr. Graham somehow violated the law. For these reasons, I consulted with an attorney in the CBS Law Department. He advised me to call Ms. Lyons back and ask her to describe the exact nature of her complaint. I did so.

5. In this second conversation, Ms. Lyons made a reference which I understood as being to the "FCC," and which I am now told was in fact the FEC. Ms. Lyons stated that the station was violating the law because it did not have "pre-existing objective criteria" for determining

who should be invited to participate in the debate. Since I was completely unfamiliar with what she was talking about, I made no comment at all on this statement. However, I did ask Ms. Lyons whether Mr. Graham had any support in the polls. This appeared to make Ms. Lyons angry and she refused to answer, repeating that the station had to have "objective criteria" to select the participants in a debate. The conversation ended without my having said anything to Ms. Lyons about the criteria used by the station in deciding whom to invite to a candidate debate. I did not speak with Ms. Lyons again.

6. At no time did I tell Ms. Lyons that the station "had no pre-established objective criteria" for selecting debate participants. I am not a lawyer and, as indicated above, was totally unfamiliar with this concept. Moreover, I never stated that the station did not consider inviting candidates other than Mrs. Clinton and Mr. Lazio. I could not have made such a statement for the simple reason that I did not know whether or not the news department had done so.

JULIANA SILVA

Sworn to before me this 13th day of November, 2000

NOTARY PUBLIC

HAROLD L. LEIBOWITZ
Notary Public, State of New York
No 31-4840391
Qualified in New York County
Commission Expires March 30, 2001

21-04-405-1668

EXHIBIT B

AFFIDAVIT

COUNTY OF NEW YORK) ss
STATE OF NEW YORK)

JOEL CHEATWOOD, being duly sworn, deposes and says:

1. I am the ExecutiveVice President/News, CBS Television Stations, and also the news director of WCBS-TV, New York. In the latter capacity, I was ultimately responsible for the debate between Hillary Clinton and Rick Lazio broadcast on the station on October 8, 2000. I submit this affidavit in connection with a complaint to the Federal Election Commission against CBS which I understand has been filed by Jeff Graham, who was the Independence Party candidate for U.S. Senator from New York in the recent general election.

2. I understand that the basis of Mr. Graham's complaint is that the station did not have "pre-established existing criteria" for deciding who should be included in the debate, which is apparently called for in FEC regulations. Let me describe the criteria applied by WCBS-TV in this and similar situations.

3. The criteria applied by the station in deciding to produce a debate including only Hillary Clinton and Rick Lazio were the same as typically go into journalistic determinations as to which candidates to invite to participate in a debate, and the extent of news coverage merited by a particular candidacy. The key is the amount of public support which the candidate has attracted and whether he is likely to have a significant impact on the ultimate outcome. In making these judgments, journalists typically consider, among other factors, the candidate's standing in the polls, the coverage he has received from other news outlets, the extent of his campaign activities, and other indications of public support, such as attendance at campaign rallies. Applying these factors in this case, it was obvious that there was no basis for inviting Mr. Graham to participate in the debate sponsored by the station.

4. At no time during the senatorial campaign did Mr. Graham register meaningful support in the polls. For instance, a poll conducted by Zogby International on October 2, 2000, only six days before the debate in question, showed Mr. Graham as attracting no measurable support at all. (Mr. Graham ultimately received only one percent of the vote.) Similarly, it appears that no newspaper or television station in the state carried any coverage of Mr. Graham's campaign beyond a relative handful of very brief mentions of the fact that he was running. In addition to this, Mr. Graham's campaign was virtually invisible even when measured by his own activities and those of his supporters. Other than a small joint

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demonstration with the Green Party at WCBS-TV on the day of the Clinton-Lazio debate, I am aware of no campaign activities by or on behalf of Mr. Graham.

5. Based on the above, Mr. Graham can only be characterized as having been a fringe candidate in the New York senatorial race, whose campaign attracted neither meaningful support nor significant attention. In these circumstances, I believe it would have disserved the public interest to include him in a debate between the two candidates who ultimately commanded 98 percent of the vote, by taking away from the already limited time which Mrs. Clinton and Mr. Lazio had to argue their positions to the voters. Of course, the distracting effect of a third candidate's participation in the debate would have been significantly aggravated by also including Green Party candidate Mark Dunau -- who, like Mr. Graham, ultimately received one percent of the vote -- not to mention the candidates of the Right to Life, Libertarian, Constitution and Socialist Workers parties, whose vote totals ranged between 4,100 and 21,000 (the latter representing approximately one-half of the votes garnered by Mr. Graham).

6. I do not want to be understood as suggesting that third party candidates should never be included in a candidate debate. Debate sponsors have found such inclusion to be appropriate on many occasions (the participation of Ross Perot in the 1992 presidential debates being only among the more prominent). What I do maintain is that, when a news organization is the sponsor of a debate, such decisions can only be made by professional journalists, based on the kinds of factors discussed above. In this particular instance, I am confident that virtually all journalists would have reached the same decision regarding Mr. Graham's participation in the October 8 debate sponsored by WCBS-TV. Indeed, the same decision was made by NBC in producing two debates between Mrs. Clinton and Mr. Lazio during the course of the campaign.

JOEL CHEATWOOD

Sworn to before me this 10th day of November, 2000

CAROL A. GRAVES
Notary Public, State of New York
No. 01-4649326
Qualified in Bronx County
Commission Expires July 31, 2001

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